

[DISCUSSION DRAFT 7/12/2010]

DELTA STEWARDSHIP COUNCIL

**I. ADMINISTRATIVE PROCEDURES GOVERNING APPEALS
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REVIEWS
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PART I- ADMINISTRATIVE PROCEDURES GOVERNING APPEALS

Introduction

1. **Purpose:** These administrative procedures govern how the Delta Stewardship Council considers appeals with regard to:

- a. Adequacy of certifications of consistency with the Delta Plan submitted to the council by a state or local public agency pursuant to Water Code sections 85225.10 and 85225.30; and
- b. Determinations by the Department of Fish and Game that the Bay Delta Conservation Plan has met the requirements of Water Code section 85320.

NOTE: Authority cited: Water Code sections 85001, 85020(h), 85022, 85057.5, 85200, 85210, 85212, 85225, 85225.5, 85225.10, 85225.15, 85225.20, 85225.25, 85225.30, 85300, 85320(e).

Review of certifications of consistency with Delta Plan

2. Any state or local public agency proposing to undertake a covered action, as defined in Water Code section 85057.5 shall consult with the council at the earliest possible opportunity, and in no event later than 30 days before submitting its certification to the council pursuant to Water Code section 85225, to ensure that the project will be consistent with the Delta Plan. The council may delegate to a member of the council, its executive officer or his designee the authority to meet with the agency or its staff to review the consistency of such proposed action and to make recommendations for action to the council. During this early consultation, the agency may also seek clarification on whether the proposed project is a “covered action.”

NOTE: Authority cited: Water Code sections 85212, 85225, 85225.5, 85225.30.

3. At least 30 days prior to its submission of a certification to the council, the state or local public agency shall post its draft certification on its website, post it conspicuously in its office, and mail it to all persons requesting notice. Members of the public shall be given an opportunity to review and comment on it prior to its submission to the council, and their comments shall be included in the administrative record accompanying the certification.

NOTE: Authority cited: Water Code sections 85225, 85225.30.

4. Any certification of consistency filed by a state or local agency pursuant to Water Code section 85225 shall set forth detailed findings that the covered action is consistent with the Delta Plan. The filing shall include the indexed administrative record that was before the state or local agency at the time it made its certification. The indexed administrative record shall be certified by the state or local agency as being “full and complete.” The entire filing, including the indexed administrative record, shall be submitted in electronic form to facilitate availability and public access. The certification shall include a checklist on a form provided by the council, which shall set forth a list of items that must be covered. The certification of consistency and the administrative record shall be public records.

NOTE: Authority cited: Water Code sections 85225, 85225.30.

5. Any person, including any member of the council or its executive officer, who claims that a proposed covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, that action will have a significant adverse impact on the achievement of one or both of the goals of the Act or implementation of government sponsored flood control programs to reduce risks to people and property in the Delta, may file an appeal no later than 30 calendar days after the filing of the certification of consistency with the council.

NOTE: Authority cited: Water Code sections 85225.10 (a), 85225.15, 85225.30.

6. The appeal shall clearly and specifically set forth the basis for the claim that the covered action is inconsistent with the Delta Plan. The appeal shall be in writing and set forth the following information:
- a. Appellant’s name and address;
 - b. The name and address of the party, if any, whose proposal is the subject of the appeal;
 - c. A description of the covered action that is the subject of the state or local public agency certification;
 - d. The identity of the state or local government body whose certification is being appealed;
 - e. The specific grounds for appeal; and
 - f. A detailed statement of facts on which the appeal is based.

The appeal shall be filed in electronic form.

NOTE: Authority cited: Water Code sections 85225.10 (b), 85225.30.

7. The appeal shall be considered “filed” with the council when the appellant’s appeal is received and determined by staff to contain all of the information listed above.

NOTE: Authority cited: Water Code sections 85225.10, 85225.20, 85225.30.

8. Within five working days of filing of an appeal of a state or local public agency certification under these procedures, the executive officer shall:
- a. Post a notice and brief description of the appeal and its effective date in a conspicuous location in the council's office and on its website;
 - b. Mail to the affected state or local public agency and any third party whose proposal is the subject of the certification a copy of the notice and a brief description, with a copy of the appeal documents filed with the council;
 - c. Mail copies of the appeal to each member of the council; and
 - d. Mail notice to the appellant that the appeal has been filed and stating the effective date of filing.

NOTE: Authority cited: Water Code sections 85225.30.

9. The appellant may, with the approval of the council or its executive officer, submit additional information from a reliable source that is both directly pertinent to the issue of consistency, and was widely-known and available at the time of the agency's certification, and that therefore should have been part of the record before the state or local agency seeking certification, but was not included in that agency's submission to the council. In addition, the council or its executive officer may request from the appellant further information necessary to clarify, amplify, correct, or otherwise supplement the information submitted with the appeal, within a reasonable period. The council or by delegation its executive officer may dismiss the appeal for failure of the appellant to provide information requested within the period provided, if the information requested is in the possession of or under the control of the appellant.

10. The council or its executive officer may augment the administrative record by its own action if it knows of, or is made aware of, additional information from a reliable source that is both directly pertinent to the issue of consistency, and was widely-known and available at the time of the agency's certification, and that therefore should have been part of the record before the state or local agency seeking certification, but was not included in the agency's submission to the council.

NOTE: Authority cited: Water Code sections 8225.10, 85225.20, 85225.25, 85225.30.

11. Any interested person may testify before the council regarding an appeal. Presentations may be oral or in writing, shall address the issues before the council, and shall be as brief as possible. The council's presiding officer may establish reasonable time limits for presentations. Any materials used or submitted to the council shall be made part of the hearing record.

NOTE: Authority cited: Water Code sections 85225.10, 85225.20, 85225.25, 85225.30.

12. All written submissions to the council may be in electronic form.

NOTE: Authority cited: Water Code section 85225.30.

13. The council shall hear all appeals of certifications of consistency filed pursuant to Water Code section 85225 within 60 days of filing unless:

- a. The parties agree to a reasonable extension approved by the executive officer, taking into account the circumstances of the matter subject to appeal and the Council's hearing schedule and associated workload, or
- b. The council, or by delegation its executive officer, determines that the issue raised on appeal is not within the council's jurisdiction or does not raise an appealable issue.

NOTE: Authority cited: Water Code sections 85225, 85225.20, 85225.30.

14. The council shall make its decision on the appeal within 60 days of hearing the appeal, and shall make specific written findings defining the covered action under review and either denying the appeal or remanding the matter to the state or local public agency for reconsideration of the covered action based on the finding that the certification of consistency is not supported by substantial evidence in the record before the state or local public agency that filed the certification.

NOTE: Authority cited: Water Code sections 85225.20, 85225.25, 85225.30.

15. No covered action which is the subject of an appeal shall be implemented unless one of the following conditions has been met:

- a. The council has denied the appeal;
- b. The public agency has pursuant to Water Code section 85225.5 decided to proceed with the action as proposed or modified and has filed with the council a revised certification of consistency addressing each of the findings made by the council, 30 days has elapsed and no person has appealed the revised certification; or
- c. The council or its executive officer has dismissed the appeal for one or both of the following reasons:
 - i. The appellant has failed to provide information in her possession or under her control within the time requested or
 - ii. The issue raised is not within the council's jurisdiction or fails to raise an appealable issue.

NOTE: Authority cited: Water Code sections 85225.5, 85225.25, 85225.30.

Review of Bay Delta Conservation Plan

16. If the Department of Fish and Game (department) determines that the Bay Delta Conservation Plan (BDCP) referred to in Water Code section 85053 meets the requirements of Water Code section 85320, it shall file the BDCP and its determination with the council.

NOTE: Authority cited: Water Code sections 85053, 85225.30, 85320.

17. Upon receipt of the department's determination, the executive officer of the council shall:

- a. Post a notice and brief description of the BDCP, the department's determination, the date of filing and the right of any person to appeal that determination on its website and in a conspicuous location in the council's office;
- b. Mail a notice and brief description of the BDCP, the department's determination and the right of appeal to any person requesting notice; and
- c. Mail copies of the determination to each member of the council.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

18. Any person, including any member of the council or its executive officer, may appeal to the council the determination of the department that the BDCP meets the requirements of Water Code section 85320.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

19. Any appeal to the council made under this chapter shall be made within 30 days of the filing with the council of the department's determination that the BDCP meets all the requirements of Water Code section 85320. The appeal shall be in writing and also in electronic form. It shall clearly set forth the specific grounds for the appeal and the specific facts upon which it is based. These shall include a list of each specific requirement of Water Code section 85320 that the BDCP allegedly fails to meet.

NOTE: Authority cited: Water Code sections 85225.30, 85320.

20. Within five working days of the filing of an appeal under these procedures, the executive director shall:

- a. Post a notice and brief description of the appeal on its website and in a conspicuous location in the council's office;
- b. Mail a notice and brief description of the appeal to any person requesting copies of such appeals; and
- c. Mail copies of the appeal and a brief description of the appeal to each member of the council.

All mailings may be made in electronic form.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

21. The council or its executive officer may request from the appellant or the department additional information necessary to clarify, amplify, correct, or supplement the information submitted with the appeal within a reasonable period.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

22. Any appeal made under this section may be dismissed if the council or its executive officer determines that it does not raise an appealable issue or if the appellant has failed to provide requested information to support her charge within a reasonable time.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

23. The council's decision shall be based on its independent judgment in reviewing the applicable law and facts.

NOTE: Authority cited: Water Code section 85225.30, 85320(d).

24. If the council decides that the BDCP does not meet all of the requirements of section 85320, it shall post its decision on its website and mail copies to the department and all parties requesting notice.

NOTE: Authority cited: Water Code sections 85225.30, 85320(d).

25. The department may revise its determination to meet the issues raised by the council, or may respond to the council's findings in detail, setting forth reasons why it has concluded that the plan meets all of the requirements of section 85320. Unless the council decides that the BDCP, as submitted or revised, meets all of those requirements, the BDCP shall not be incorporated within the Delta Plan and the public benefits associated with the BDCP shall not be eligible for state funding.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (a), (b), (e).

Ex Parte Contact Restrictions Applicable to All Appeals

26. Hearings on appeals are subject to the ex parte communication restrictions of California Administrative Procedures Act (Gov. Code § 11430.10 et seq.). Under that Act, an ex parte communication is a "communication, direct or indirect, regarding any issue in the proceeding, to the [council or council member] from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication." (Gov. Code § 11430.10.) The restrictions apply from the date that the appeal is filed to the date that the council reaches a final decision on the appeal.

NOTE: Authority cited: Government Code sections 11430.10, 11430.80, Water Code section 85225.30.

27. To ensure compliance with these provisions, members should avoid ex parte communications while an appeal is pending. If they nevertheless receive one, such as by an individual sending a letter to a member concerning a pending matter, the member should notify the council's legal adviser or executive officer so that appropriate measures can be taken.

NOTE: Authority cited: Government Code sections 11430.10, 11430.80, Water Code section 85225.30

28. At the first appropriate meeting after an appeal is anticipated or filed, the council's legal adviser will remind the council of this restriction and answer questions about its scope.

NOTE: Authority cited: Government Code sections 11430.10, 11430.80, Water Code section 85225.30.

Official Notice

29. Notwithstanding any provision of these procedures to the contrary, the council may take official notice in any hearing that it conducts, of any generally accepted technical or scientific matter within the council's jurisdiction, and of any fact that may be judicially noticed by the courts of this State.

NOTE: Authority cited: Government Code section 11515, Water Code section 85225.30.

Filings and Mailings

30. All filings and mailings required by section 1-29 of these procedures may be made electronically.

NOTE: Authority cited: Water Code section 85225.30.

PART II—STATUTORY PROVISIONS REQUIRING OTHER CONSISTENCY REVIEWS (AFTER ADOPTION OF THE DELTA PLAN)

In several other sections of SB X7 1, the council is directed to review for consistency with the Delta Plan, various plans of specified public agencies. This Part is directed at those reviews, which fall outside the scope of the procedures covered by Part I.

1. Delta Protection Commission's Economic Sustainability Plan.

Public Resources Code section 29759 requires the Delta Protection Commission (DPC), by July 1, 2011, to adopt an economic sustainability plan. That plan must include information and recommendations that inform the council's policies regarding the socioeconomic sustainability of the Delta's region.

Public Resources Code section 29761.5(b) requires the DPC to transmit copies of the plan to the council within 60 days of adoption. The council is required, within 180 days of the adoption of the plan, to review the plan for consistency with the Delta Plan.

2. Local and Regional Planning Documents.

Water Code section 85057.5(b)(3), excepts from the definition of “covered action”, regional transportation plans prepared pursuant to Government Code section 65080. Paragraph (4) of that same section, excepts from the definition of “covered action”, plans, programs, projects or activities within the secondary zone of the Delta that the applicable metropolitan planning organization under Government Code section 65080 has determined is consistent with either a sustainable communities strategy or an alternative planning strategy that would achieve specified greenhouse gas emission reduction targets as determined by the Air Resources Board.

Because they are not “covered actions”, these types of local and regional planning documents are not subject to the statutory provisions governing consistency of state and local public agency actions (Water Code secs. 85225 et seq.), or the council’s Administrative Procedures Governing Appeals (Part I, above), with one exception noted in paragraph (d), below.

However, Water Code section 85212 provides a separate requirement and process for consistency review by the council of these types of local and regional planning documents.

In particular:

- a. The council is required to review and provide timely advice to local and regional planning agencies regarding the consistency of local and regional planning documents, including sustainable communities strategies and alternative planning strategies prepared pursuant to Government Code section 65080, with the Delta Plan.
- b. The council’s input must include, but not be limited to, reviewing the consistency of local and regional planning documents with the ecosystem restoration needs of the Delta and reviewing whether the lands set aside for natural resources protection are sufficient to meet the Delta’s ecosystem needs.
- c. A metropolitan planning organization preparing a regional transportation plan that includes land within the primary or secondary zones of the Delta must consult with the council early in the planning process regarding the issues and policy choices relating to the council’s advice.
- d. No later than 60 days prior to the adoption of a final regional transportation plan, the metropolitan planning organization must provide the council with a draft sustainable communities strategy and an alternative planning strategy, if any. Concurrently, the metropolitan planning organization must provide notice of its submission to the council in the same manner in which agencies file a certificate of consistency with regard to covered actions.

- e. If the council concludes that the draft strategies are inconsistent with the Delta Plan, the council must provide written notice of the claimed inconsistency to the metropolitan planning organization no later than 30 days prior to the adoption of the final regional transportation plan.
- f. If the council provides timely notice of a claimed inconsistency, the metropolitan planning organization's adoption of the final regional transportation plan must include a detailed response to the council's notice.

PART III--OTHER FORMS OF REVIEW OR EVALUATION BY THE COUNCIL

1. Interested parties, including federal, state and local public agencies, are encouraged to confer with the council or its executive officer over the scope and potential impacts of the interim plan developed under Water Code section 85084. Interested parties will be provided an opportunity to comment and provide input on the interim plan as it is developed.

2. Similarly, prior to adoption of the Delta Plan, project proponents are encouraged to consult with the council or its executive officer early in the planning stages of projects that may constitute "covered actions" under Water Code section 85057.5 once the Delta Plan is adopted. Subject to available resources, the council may review and comment on planning documents and environmental review documents regarding potential "covered actions".

3. Subject to available resources, the executive officer or his designee may meet with interested parties, upon their request, to help mediate relevant disputes, including disputes, once the Delta Plan is adopted, over whether a project constitutes a "covered action" under Water Code section 85057.5. The intent of this mediation will be to provide an objective and informal forum for dispute resolution that will serve as a more efficient alternative to costly and time- consuming litigation.

4. Interested parties, including federal, state and local agencies, are encouraged to confer and coordinate with the council or its executive officer with regard to agency plans, studies, strategies, and recommendations required, or otherwise suggested, to be considered by the council for incorporation into the Delta Plan.